IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERCOLLEGIATE BROADCAST SYSTEM, et al.,	)	
Petitioners	)	
v.	)	No. 02-1220
JAMES H. BILLINGTON, Librarian of Congress,	)	
Respondent.	)	

REPLY OF THE RESPONDENT, THE LIBRARIAN OF CONGRESS, IN SUPPORT OF THE LIBRARIAN'S MOTION TO DISMISS THE PETITION FOR REVIEW FOR LACK OF STANDING

The Respondent, the Librarian of Congress ("the Librarian"), respectfully submits this Reply in response to the Petitioners' August 14, 2002 "Opposition To Librarian's Motion To Dismiss" ("Opposition") and in further support of the Librarian's Motion to Dismiss the Petition, filed August 7, 2002. For the reasons set forth below and in the Motion, the Librarian's Motion to Dismiss should be granted and the petition for review filed by Intercollegiate Broadcasting System, Inc. ("IBS") and Harvard Radio Broadcasting Co, Inc., ("Harvard") should be dismissed.

1. Petitioners first concede that the "aggrieved party" language of 17 U.S.C. 802(g), is "analogous" to the substantively identical language of the Hobbs Act, 28 U.S.C. 2344 at issue in *Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir.1983), a case in which this Court made clear that party status required that the entity seeking judicial review must have participated in a more than de minimis manner before the agency itself. (Opp. at 2). Not disputing the holding of *Simmons*, petitioners instead purport to rely on *Water Transport Association v. ICC*, 819 F.2d 1189, 1192 n.27 (D.C. Cir. 1987), for the argument that *Simmons* imposed a "'more stringent standard,'"

which, petitioners claim, "is not fully exportable." (Opp. at 2). Petitioners assert that *Simmons* should not be applied to Section 802(g) because Section 802(g) allows judicial review by "'any aggrieved party who would be bound by the determination.'" (*Id.*, quoting 17 U.S.C. 802(g)).

Petitioners' attempt to distinguish the standard established in *Simmons* is unavailing. First, as *Water Transport* itself makes plain, the "aggrieved party" language is "more stringent" because it demands more than the "general review provision of the Administrative Procedure Act," which allows judicial review by any "*person*" who is aggrieved by agency action. *Water Transport*, 819 F.2d at 1192 n.27. Both the Hobbs Act and Section 802(g) share this very same "stringent" requirement. Certainly, nothing in *Water Transport* suggests that the term "aggrieved party" should be read differently from statute to statute. Indeed, as pointed out in the Motion to Dismiss (Motion at 7), this Court has expressly found "no reason to depart" from the approach followed under *Simmons* in construing that same language in other statutory schemes. See *Jones v. Board of Governors*, 79 F.3d 1168, 1171 (D.C. Cir. 1996) (construing the Bank Holding Company Act). Petitioners simply ignore that holding.

Equally unavailing is petitioners' oblique suggestion (Opp. at 2) that a different approach is appropriate here because Section 802(g) allows judicial review to "any aggrieved party who would be bound by the determination." Petitioners apparently would read the phrase "who would be bound by the determination" to mean that judicial review is available to any person who is thus "bound," regardless of whether that person was a party. However, as a matter of basic grammar, the phrase "who would be bound" modifies the term "aggrieved party" and thus, if anything, the "who would be bound" language **restricts** the class of "parties" entitled to seek judicial review. See *Murphy Exploration and Production Co. v. U.S. Dept. of the Interior*, 252 F.3d 473, 483 (D.C. Cir.), *modified on rehearing*, 270 F.3d 957 (D.C. Cir. 2001) ("'rules of

grammar apply in statutory construction'"). (Citation omitted). *A fortiori*, judicial review may not be sought by *non*-parties "bound" by the Librarian's rulings under the Reform Act, just as judicial review is not available to non-parties bound by decisions reviewable under the Hobbs Act (*Simmons*), or to non-parties bound by decisions reviewable under the Bank Holding Company Act (*Jones*).

2. Petitioners also err in arguing that "IBS participated below by filing a caveat with the Librarian on June 6, 2002." (Opp. at 2). That "caveat," filed months after the completion of CARP proceedings[1] and a mere two weeks before the Librarian issued his decision on June 20, 2002, does not constitute sufficient "participation" to accord IBS "party" status under Section 802(g). First, the "caveat" itself makes clear that it was a "collateral filing," intended to press legal arguments by an admitted non-party to the proceeding. (Opp., Attachment 4 at 1). Indeed, the Librarian treated the filing of this "caveat" as a non-party, *ex parte* communication which, under the Librarian's regulations, "shall not be considered part of the record for the purposes of decision." 37 C.F.R. 251.33(f)(1). See Certified Index to the Record at 65, 68, filed August 21, 2002. The "caveat" was thus not part of the record considered by the Librarian in reaching the decision at issue in this case and is not part of the record before this Court, where judicial review is strictly limited to the record "before the Librarian" by Section 802(g).

More fundamentally, this Court should not accord party status on IBS because of such a "caveat." Deeming such a "caveat" sufficient to confer party status would permit IBS to end-run the CARP proceeding, thereby denying the Panel the opportunity to address the concerns articulated in the caveat as well as depriving the actual parties of their rightful opportunity to

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[1] The CARP issued its decision on February 20, 2002. See http://www.copyright.gov/carp/webcasting_rates.html.

respond to the arguments there presented. In addition, requiring the Librarian to accept and consider such a last-minute filing is not only contrary to the Librarian's regulations, noted above, but would also disrupt the Librarian's ability to consider the arguments and evidence properly presented on the record created by actual parties before the CARP. Finally, permitting such a filing would allow IBS to improperly evade the arbitration costs expressly imposed by law on parties to the CARP proceedings. See 17 U.S.C. 802(c); 17 U.S.C. 802(h)(1). In sum, petitioners' "caveat," if allowed, would be grossly unfair to the actual parties, who participated in accordance with the rules, and undermine the ability of the CARP and the Librarian to formulate and consider the administrative record crucial to the functioning of this statutory scheme. These considerations, highlighted by the Librarian in his Motion (at 10-12), are ignored by petitioners.

The case law also makes clear that such "participation" is insufficient to confer "party" status for purposes of allowing judicial review as an aggrieved party. The rule is that "[t]he degree of participation necessary to achieve party status varies according to the formality with which the proceeding was conducted." *Water Transport*, 819 F.2d at 1192. Thus, in *Water Transport*, the Court held that an entity acquired party status by filing administrative comments in a very informal administrative proceeding, where the agency had merely requested "general protests of its provisional suspension of the thirty-day waiting period." (819 F.2d at 1193). In contrast, in *Alabama Power Co. v. ICC*, 852 F.2d 1361 (D.C. Cir. 1988), this Court distinguished *Water Transport*, holding that unlike the "highly informal proceedings involved in *Water Transport*," the ICC administrative proceedings at issue in *Alabama Power* were "informal *rulemaking* in which the parties were invited to . . . make full presentations of their views." (852 F.2d at 1168). (Emphasis the Court's). In such proceedings, the Court ruled, it was not sufficient for the petitioner to present affidavits to its trade association, which in turn, presented

those affidavits to the agency. (*Id.*). As the Court explained, the Court simply does not have discretion to allow such a non-party to seek judicial review. (*Id.*).

The rate making administrative proceedings at issue in this case are more formal than the informal "rulemaking" at issue in *Alabama Power,* and obviously far more formal than the "highly informal proceedings" presented in *Water Transport.* Here, the resulting rates are legally binding and published in the Code of Federal Regulations. See 67 Fed. Reg. at 45272, promulgating 37 C.F.R. Part 261. As detailed in the Librarian's Motion (Motion at 2-4, 9), the Reform Act and implementing regulations create elaborate, trial-type administrative proceedings, with detailed rules governing participation as well as the discovery and presentation of evidence and argument to the CARP. See 37 C.F.R. Part 251. Librarian review and subsequent judicial review is expressly limited to the administrative record thus created in these formal CARP administrative proceedings. See *RIAA v. Librarian of Congress*, 176 F.3d 528, 535-36 (D.C. Cir. 1999). Under this highly structured and formal administrative structure, the requisite "full presentation of views" (*Alabama Power*, 852 F.2d at 1168), requires formal participation in those trial-type proceedings before the CARP. Neither IBS nor Harvard claims any such participation.

3. IBS also argues that it, as a trade association, has standing to represent its members in the court of appeals. (Opp. at 3). That assertion, however true, is utterly irrelevant. The fact remains that IBS was never a party to CARP proceedings under the regulations. Specifically, IBS does not contend that it ever participated in CARP proceedings on behalf of its members. IBS did not even file a notice of intent to participate, a fact that it does not dispute. While IBS may well have had standing to participate in CARP proceedings on behalf of its members, IBS

cannot be an "aggrieved party" for purposes of Section 802(g) where it chose not to participate in those administrative proceedings.

Perhaps in recognition of its non-participation, IBS now relies on the notices of intent to participate filed by three of its members. (Opp. at 3). This attempt to bootstrap an association into party status by reference to filings by an association's members cannot be accepted. IBS and its members are all separate legal entities which cannot be merged for purposes of determining party status. See, e.g., *Alabama Power*, 852 F.2d at 1368 (distinguishing between an association and its member in denying party status to the member under the Hobbs Act). In any event, IBS cannot derive party status from its members where its members did not, in fact, have party status on their own. Here, as IBS concedes (Opp. at 3), the three members of IBS who did file notices of intent to participate[2] expressly withdrew from the CARP proceedings without presenting a case. Under the regulations, these three IBS members were not parties to CARP proceedings, were not liable for arbitration costs under Section 802(c) and Section 802(h)(1) and were not parties to the subsequent proceedings before the Librarian. See Motion at 2-4. Indeed, none of these three members even made the argument that they were entitled to some special dispensation from the statutory-imposed arbitration costs by virtue of the Regulatory Flexibility Act of 1980, the novel contention IBS now wishes to press on appeal. See Opp. at 4.

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[2] IBS complains (Opp. at 3) that the index of entities that had filed a notice of intent to participate, attached as Attachment A to the Declaration of Eugenia Giuffreda filed with the Librarian's Motion, incorrectly failed to list one of its members, Monmouth University. The index, however, simply lists the names of the *services* that filed notices of intent to participate. The notice filed by Monmouth listed the name of its service as WMCX 88.9 FM. That *service* is on the index as entry 104. There was no omission.

4. Petitioners complain bitterly about the arbitration costs statutorily imposed on the parties by the Reform Act, asserting that the Librarian should have permitted small entities to participate in CARP proceedings without incurring such costs. Opp. at 4. That argument is both legally irrelevant and without merit.

The Librarian is not insensitive to the plight of small businesses. To the contrary, the Librarian expressly requested comments on ways to encourage participation by such small entities in the CARP process. See Order of January 18, 2001 at 4, attached as an exhibit to Attachment 4 of Petitioners' Opposition to the Motion To Dismiss. Ultimately, however, the Librarian concluded that the regulations, 37 C.F.R. 251.43(a), required that parties file a direct written case containing testimony by a witness or witnesses. See Order of March 16, 2001 at 3, attached as an exhibit to Attachment 4 of Petitioners' Opposition ("March 16, 2001 Order"). As the Librarian explained, the purpose of the rule "is to allow full examination and cross-examination of all testimony before the CARP renders its determination." (*Id.*). The Librarian also noted that the parties bear the cost of the panel proceedings, as required by the Reform Act itself. (*Id.*). See 17 U.S.C. 802(c); 17 U.S.C. 802(h)(1). Given this statutory imposition of costs and the trial-type, formal nature of CARP proceedings, the Librarian's decision was both correct and eminently sensible. See *Envirocare of Utah, Inc. v. Nuclear Regulatory Com'n.*, 194 F.3d 72, 78 (D.C. Cir. 1999). The Librarian thus encouraged small entities "to pool their resources with those in like circumstances for the submission of one or more joint written direct cases as permitted by the rules," an approach often used by smaller parties before a CARP. (*Id.* at 4).

Petitioners now assert that this March 16, 2001 order constituted a "denial of participation" that they have standing to appeal. (Opp. at 4). However, the Librarian's March

16, 2001 Order did not "deny participation" to anyone. Rather, the order, combined with the January 18, 2001 Order, simply construed the Librarian's regulations and made clear that those who wished to participate in CARP proceedings must comply with those regulations. The Librarian is, of course, bound by his own regulations, *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997), and his interpretation of those regulations is entitled to substantial deference, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). See also *Darrell Andrews Trucking, Inc. v. Federal Motor Carrier Safety Admin.*, 296 F.3d 1120 (D.C. Cir. 2002). Any failure to adhere to these regulations could well have ensured a challenge by other entities which were parties and which, understandably, objected to a deviation from the rules. See March 16, 2001 Order at 3 (noting that RIAA objected to allowing small entities to file amicus briefs). The Librarian's decision merely affirmed the preexisting ground rules, but left the choice to participate entirely up the interested entities.

Even assuming *arguendo* that the March 16, 2001 order could somehow be construed as a denial, the only comments received on this question of participation were from Manning Broadcasting, Inc., SBR Creative Media, Inc., WCPE-FM, and Performing Artists' Society of America. See March 16, 2001 Order at 3. Neither IBS nor Harvard claim that they sought to file comments in response to the Librarian's January 18, 2001 solicitation. Since neither IBS nor Harvard even attempted to respond to the Librarian's solicitation of comments, neither has standing to challenge the Librarian's March 16, 2001 Order. See Motion at 11 & n.6. See also *Nichols v. Board of Trustees of Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 896 n.107 (D.C. Cir. 1987) (noting "judicial recognition that intervention in administrative proceedings often greatly facilitates meaningful judicial review").

Finally, and perhaps most fundamentally, petitioners here offer no reason that they could not have employed the common practice of combining resources so as to present a direct written case to the CARP, as required by the rules. Presumably, as an association, IBS has more resources for such purposes than do its individual members. Certainly, IBS is now expending substantial resources in filing its belated "caveat" with the Librarian and seeking judicial review of the Librarian's decision in this Court. These same resources, in combination with the resources of other, similarly situated, entities, plainly could have been utilized to participate in the formal CARP proceedings in compliance with the Librarian's rules. Petitioners' failure to participate can thus only be explained by a desire to avoid the litigation costs and all of the statutorily-imposed arbitration costs so as to conserve funds for a challenge in this Court. Opp. at 4.

Such a decision to flout the rules of the agency so as to concentrate resources on seeking judicial review is precisely the sort of tactic Congress intended to bar in limiting standing to "parties" in Section 802(g). By this maneuver, petitioners have not only unfairly burdened and prejudiced the rights of those who did participate, but also effectively deprived the CARP of the opportunity to pass on the allocation of the costs. The CARP has broad discretion over the allocation of the costs among the parties. See 17 U.S.C. 802(c). Had IBS and Harvard participated in the proceedings, they could have asked the CARP on the first day for a ruling limiting their costs, and the Panel might well have satisfactorily addressed their concerns. Instead, petitioners chose to sit out the proceeding and complain about their self-imposed "exclusion" after the fact. This they may not do. See, e.g., *Nader v. Nuclear Regulatory Comm'n*, 513 F.2d 1045, 1054 (D.C. Cir. 1975) (noting that interested persons "should not be entitled to sit back

and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated'"). (Citations omitted).

Finally, even if the Panel had chosen to impose significant costs on small entities, IBS and Harvard, had they had become proper parties, could have sought relief by ultimately appealing the Panel's decision to this Court. Yet, by failing to exhaust these administrative remedies, IBS and Harvard have effectively deprived this Court of an opportunity to consider these contentions on the basis of a fully developed factual record – precisely the sort of record demanded by the statutory scheme. See Motion at 9-10. In sum, petitioners' complaint that they have been effectively excluded because of the costs of CARP proceedings should not be heard.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Librarian's August 7, 2002 Motion to Dismiss, the petition for review filed by IBS and Harvard should be dismissed for want of standing.

Respectfully submitted,

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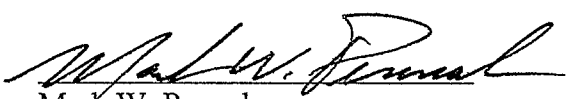

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2002, I served one copy of the foregoing "REPLY OF THE RESPONDENT, THE LIBRARIAN OF CONGRESS, IN SUPPORT OF THE LIBRARIAN'S MOTION TO DISMISS THE PETITION FOR REVIEW FOR LACK OF STANDING" upon the following named counsel, via hand delivery:

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